

ARTICLES

CONFLICT OF LAWS, ECONOMIC REGULATIONS AND CORRECTIVE/DISTRIBUTIVE JUSTICE

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ABSTRACT

This Article investigates the private international law implications of national regulatory laws and welfarism in contract and tort law. The emergence of various forms of regulatory laws, and the idea that contract and tort law are mechanisms for implementation of distributive justice and welfare values, present a challenge to conventional conflict of laws theories. As a response to such developments, and given the changes that global society is undergoing, national conflict of laws system have responded in different ways. This Article, while discussing and evaluating the most famous conflict of laws systems, tries to offer a more balanced and comprehensive picture. The Article adheres to a distinction between corrective and distributive justice for both national and international private interactions. As much as rules of contract and tort law should not be utilized to achieve welfare values and distributive justice, in an international context the domains of corrective and distributive justice should a fortiori remain distinct.

1. INTRODUCTION

The main dispute between the parties to a private international interaction often arises over the meaning and scope of substantive laws. In a dispute, sometimes the extent or the very existence of a private right may be questioned. However, while there are many different sources of disputes between private parties, the focus of this Article is on those occasions when the source of a private dispute is either a regulatory public law or governmental interest. "Like its domestic counterpart," this kind of litigation "seeks to vindicate public . . . values through judicial [and private] remedies."¹ Examples of this kind of dispute are to be found in international claims arising from national competition laws, securities regulation, and some aspects of intellectual property laws affecting contracts or modern tort cases with social implications involving insurance companies and social security.²

¹ Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2347 (1991).

² See Mahmood Bagheri & Chizu Nakajima, *Ex Ante and Ex Post Allocation of Risk of Illegality: Regulatory Sources of Contractual Failure and Issues of Corrective and Distributive Justice*, 13 EUR. J. L. & ECON. 5, 5-26 (2002) (discussing how the effectiveness of contractual allocation of risk of illegality varies depending on which contract theory prevails); P.B. Carter, *Contracts in English Private International Law*, 57 BRIT. Y.B. INT'L L. 1, 22-27 (1987) (explaining how international contract dis-

Besides the question of discovering the nature of a dispute, and because of the possibility of involvement of various legal systems, the adjudication of substantive disputes in an international context requires the selection of a system of law against which such claims can be evaluated. The choice of this legal system is not as simple as it seems. As much as the underlying policies of substantive law may vary, the choice of conflict of laws system, through which substantive laws are identified, could be based on either a simple decision to render corrective justice or could be influenced by policy objectives and welfare values. In recent years, as a result of the actual or alleged operation of regulation and growing public interest over the outcome of private disputes, the choice of a legal system to govern the matter has become more complex. This is because the extent and scope of this choice touches upon boundaries of corrective and distributive justice and reflects a more fundamental tension in a wider social and economic context. In order to determine the international reach of national economic regulations or their impact on private interactions, judges need to adopt a conflict of laws system which, identifying and recognizing these boundaries, can accommodate both private rights and public interest.

The situation with which we are dealing concerns two kinds of developments to which private international law cannot remain indifferent: the proliferation of regulatory public law rules and the emergence of private disputes, linking private rights to public interest. As modern societies become more complex, the issue of managing and reconciling public interests and individual rights, particularly in the area of economic activities, has increasingly created a dilemma. The emergence of regulatory laws and also the trend towards pursuing public policy through private law institutions has transformed the environment within which the rules of private international interactions operate. These developments have far more serious implications for conflict of laws rules. Parallel to this transformation, the international relations have also undergone changes and globalization has intensified. Such developments have posed a challenge for theories of conflict of laws.

putes are handled in English courts); D.F. Libling, *Formation of International Contracts*, 42 MOD. L. REV. 169 (1979) (describing the problems of determining whether an international contract has been formed under English law); Frank Vischer, *General Course on Private International Law*, 232 RECUEIL DES COURS 9, 158 (1992) ("[O]ne of the principal sources of conflict arises out of the ever-growing network of regulatory laws which . . . have an impact on private rights and obligations.").

Conflict of laws regimes have responded to these changes in various ways. The Rome Convention on contractual matters introduced the concept of mandatory rules, which, to a large extent, represented the rules and regulation with a public interest flavor. This is a new development in private international law, which tries to safeguard public interest and welfare values in international litigation. American governmental interest analysis that was mainly developed in the context of tort law, on the other hand, links the fate of a dispute to underlying policies of private law. This approach, which favors a total elimination of conflict rules, focuses on unveiling the underlying policies of substantive rules with a view to give preference to a private law right, which is aligned with the public interest. This utilitarian approach is a natural and logical extension of theories of private law, which consider tort or contract law as instruments for advancing public interest and welfare values. English proper law theory, however, has taken a more ambivalent approach in respect of the above developments and in particular about the place of mandatory and regulatory rules in the process of choice of law. It seems that the subjective and objective criteria used under proper law theory has complicated the situation in a way which allows an unjustified inclusion and exclusion of home or foreign mandatory rules (public interest) in the legal regime applicable to an international dispute.

The aim of this Article is to sketch the most well-known conflict systems and examine their ability to offer a fair and practical solution. This Article will examine the impact of theories of rights and utilitarianism on conflict of laws theories and their responses to the above transformation and shall try to offer a more balanced solution, which is less formal and consistently loyal to the corrective and distributive justice dichotomy. Private international law also offers a unique context to test the viability of rival theories of private law.

2. THE EMERGENCE OF ECONOMIC REGULATIONS AND WELFARE VALUES IN PRIVATE LAW

The world where maximum freedom for private interactions through private law institutions was possible has, to a large extent, disappeared. In modern societies, where social interactions are increasingly interdependent and multiple, individuals are not isolated units. The social and welfare implications of private interactions go far beyond the private and autonomous domains of

individuals. As a result of the intensity, interdependence, and frequency of social interactions, individual choices often have ramifications for others. As social interdependence and integration intensifies, the just distribution of benefits and burdens of social cooperation under a theory of justice become more complicated.

Justice in its social sense means sharing the social benefits and burdens on a just basis. In order to understand and explain modern societies, and to recommend a suitable legal order under which a fair and just distribution of social benefits and burdens could be carried out, we need sophisticated theories of justice, which go even beyond the justice in bipolar individual interactions. Distributive justice theories are the main normative criteria against which socially meaningful assessments and evaluations can be made. Against this normative system, the areas where the market interactions under private law fail to produce justice are identified. Market and private law failures often occur in the form of monopolistic anticompetitive behavior, externalities and asymmetries of information, which have adverse effects on the interests of individuals and society at large. The means to rectify such failures include regulation such as competition law, securities regulations, exchange control and foreign trade regulations. There has been a long-standing discussion over the scope of regulatory intervention in individuals' freedom, reflecting a wide range of ideological attitudes in respect of the choice of regulation to achieve social objectives.³

Apart from the question as to which roles regulatory laws play in modern societies, another debate that has complicated the situation is the controversy over the relationship between private law rules and distributive justice. The debate on whether or not the rules of private law institutions, such as contract and tort, are no longer exclusively about corrective justice and theories of rights, and instead pursue welfare objectives and reflect some distributive values, is an ongoing debate with far-reaching implications

³ See Stanley I. Benn & Gerald F. Gaus, *The Liberal Conception of the Public and the Private*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 31, 60 (Stanley I. Benn & Gerald F. Gaus eds., 1983) (discussing the balancing of public interests and private rights); HERBERT L.A. HART, *Utilitarianism and Natural Rights*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 181 (1983) (tracing the historical roots of the ongoing disagreement between Utilitarianism and Natural Rights advocates); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 859 (1985) (reviewing Hobbes' and Rousseau's philosophies regarding social contracts).

at both domestic and international levels.⁴ The welfare theorists claim that rules of contract and tort law could not be sustained without a distributive justice support. In other words, the justice in private law is not just justice, but a reflection of each individual's distributive share.⁵ Private law rights should be upheld only to the extent that they serve social objectives in the long run and lead to the efficient allocation of resources.⁶ The argument in favor of a theory of contract and tort that would include welfare objectives in formulating rules of contract or tort law has had strong supporters in recent years.⁷

⁴ See Bagheri & Nakajima, *supra* note 2 (arguing that maintaining the validity of a prohibited and failed contract is crucially dependent on whether we adhere to a welfare or rights-based theory of contract).

⁵ See P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 4, 8-12 (5th ed. 1995) (discussing shifting judicial conceptions of justice in contract law); P.S. ATIYAH, *Essay No. 2: Contracts, Promises and the Law of Obligations*, in *ESSAYS ON CONTRACT* 10 (1986) (critiquing the presuppositions underlying the classical model of contracts); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 405-09 (1979) (describing the will theory of contract law); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 720-30, 738 (1990) (examining various approaches to contract interpretation).

⁶ See Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563-575 (1982) (providing background on the social and conceptual framework of contract law); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472, 474 (1980) (arguing that the non-distributive conception of contract law cannot be supported either on liberal or libertarian grounds, and defending the view that rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be costly or intrusive); see also JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 161-62 (rev. ed. 1990) (exploring the extent to which contract law is private law); Larry Alexander & William Wang, *Natural Advantages and Contractual Justice*, 3 L. & PHIL. 281-82 (1984) (asserting that Libertarianism does not recognize any advantage-taking as being legitimate); see generally Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L. J. 1261 (1980) (exploring the doctrinal bases for contract law); Donald R. Harris & Cento G. Veljanovski, *The Use of Economics to Elucidate Legal Concepts: The Law of Contract*, in *CONTRACT AND ORGANISATION: LEGAL ANALYSIS IN THE LIGHT OF ECONOMIC AND SOCIAL THEORY* 109, 109-19 (Terence Daintith & Gunther Teubner eds., 1986) (suggesting that despite the natural limitations of economics, lawyers should still benefit from the insight it offers). Atiyah, by relying on his historical research on the rise and fall of freedom of contract, argues that economic ideological belief in freedom of contract was closely associated with the development of contract theory from 1170-1870. Further, he suggests that most lawyers would be willing to agree that rules of contract law (common law) are likely to enhance the general welfare, and that they are therefore efficient as well as morally desirable. See generally Atiyah, *THE RISE AND FALL OF FREEDOM OF CONTRACT*, *supra* note 5, at 36-60.

⁷ See, e.g., Hugh Collins, *Distributive Justice Through Contracts*, in 45 *CURRENT*

On the other hand, the advocates of theories of rights argue that contract and tort law are essentially neutral in respect to welfare objectives and pursue corrective justice. The importance of such theories becomes greater when we are dealing with the impact of regulatory laws on private law interactions—i.e., contract or tort.⁸ Relying on the concept of “corrective justice” as the basis of private law rules, the proponents of a “rights” based view would argue that in enforcing private rights courts should not strive to achieve a particular social or economic goal but instead they ought to do justice between the parties.⁹ The function of private law is to guarantee a “just” private interaction between individuals in their autonomous private zone. Corrective justice has been generally thought of as consisting of those principles that directly govern private interaction.¹⁰ Corrective justice in this respect is mainly based on the assumption that the benefits of liberty and justice always prevail over collective goals.¹¹ Considerations of liberty come be-

LEGAL PROBLEMS (PART 2: COLLECTED PAPERS) 49 (R.W. Rideout & B.A. Hepple eds., 1992) (examining means of achieving distributive justice in contract law); Dieter Hart, *Towards Risk Management in Contract Law?*, in PERSPECTIVES OF CRITICAL CONTRACT LAW 123, 123–25 (Thomas Wilhelmsson ed., 1993) (noting the rise in social policy as a goal of contract law in recent years).

⁸ See Isaac Ehrlich, *The Optimum Enforcement of Laws and the Concept of Justice: A Positive Analysis*, 2 INT’L REV. L. & ECON. 3, 5 (1982) (illustrating the social welfare effects of law).

⁹ Peter Benson, *The Idea of A Public Basis of Justification for Contract*, 33 OSGOOD HALL L. J. 273, 287 (1995) (“By themselves, efficiency criteria cannot possibly constitute an adequate normative theory for the analysis of contract.”).

¹⁰ See Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992) (examining theories of corrective justice and its relation to distributive justice); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56–59 (1995) (discussing Aristotle’s theory of corrective justice, which focuses on structural aspects of justice between individuals); see also Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, 1 CAN. J. L. & JURISPRUDENCE 3 (1988) (focusing on private law in examining corrective justice); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 313–20 (1990) (discussing Aristotle’s *Nicomachean Ethics* in the context of corrective justice). If corrective justice is understood only as a formal scheme, Atiyah raises serious doubts over the viability of corrective justice as a formal and procedural basis for the justice of contract law rules. See P.S. Atiyah, *Contract and Fair Exchange*, in *ESSAYS ON CONTRACT* (1986), *supra* note 5, at 329 (noting the recent blurring of the lines between procedural and substantive fairness).

¹¹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) (“Individual rights are political trumps held by individuals.”); Ronald M. Dworkin, *Is Wealth A Value?*, 9 J. L. STUD. 191, 192–94 (1980) (arguing that hard cases should be decided in such a way as to maximize social wealth); see also Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 526, 548–49 (1980) (analyzing further wealth maximization alternatives); Rochelle Spergel, *Paternalism and Contract: A Critique of Anthony Kronman*, 10 CARDOZO L. REV. 593, 605–11 (1988)

fore considerations of welfare in lexical ordering.¹² This means that the goal of ensuring for each participant in practice the most extensive liberty that is compatible with a like liberty for all cannot be overridden in the pursuit of any social objective.¹³ "[T]he principles which protect individual liberty are principles asserting the existence of inviolable rights."¹⁴

3. THE ORIGIN OF CONFLICT RULES AND THE CORRECTIVE/DISTRIBUTIVE JUSTICE DICHOTOMY

Before the formation of modern nation-states, states either shared a common legal system or did not recognize any foreign legal norm. The ancient conflict of laws systems, which existed in Greek and Roman times and further developed into those of the Middle Ages, did not amount to proper conflict of laws systems as we know them today. It was only with the rise of nation-states and the arrival of national legal systems functioning within national borders that a need for a legal discipline, coordinating inherently different national legal norms in private international relations, became evident.¹⁵ Private international law was invented as a mechanism for the reconciliation of higher levels of natural law with the existence of diverse laws in different jurisdictions.¹⁶ Choice of laws rules are similar to default rules at national levels,

(discussing how paternalism and utilitarianism are insufficient means to reach self-autonomy in contract law).

¹² See JOHN RAWLS, *A THEORY OF JUSTICE* 27–28, 33, 40–45, 42–43, 60–65 (1971) (discussing how placing justice principles in a lexical order or as the product of choice determinations operates on social welfare).

¹³ The normativity of corrective justice pertains to the immediate interaction of one free being with another. Its normative force derives from Kant's concept of right as the governing idea for relationships between free beings. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 2 (1982).

¹⁴ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 163 (1986); see also TIBOR R. MACHAN, *INDIVIDUALS AND THEIR RIGHTS* xxiv, xxv (1989) (discussing natural-rights theory, which protects individual liberty).

¹⁵ See FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 6–10 (1993) (explaining how Roman choice of law rules developed to deal with non-citizens in its empire, inspired by Greek mercantile courts); Marielle Koppenol-Laforce, *Private International Law*, in *INTERNATIONAL CONTRACTS: ASPECTS OF JURISDICTION, ARBITRATION AND PRIVATE INTERNATIONAL LAW* 113, 121 (Marielle Koppenol-Laforce ed., 1996) (discussing the challenges that the miniature city-states of Florence, Rome, and Padua faced as trade between them increased).

¹⁶ See Alex Mills, *The Private History of International Law*, 55 *INT'L & COMP. L.Q.* 1, 21 (2006) ("[P]ositivist international law was conceived . . . as existing purely 'between' states and not 'above' them.").

which tend to contribute to great private ordering.¹⁷ The purpose of private international law is to make possible the application, within the territory of the state, of the law of foreign states. This is an object facilitated by considerations of justice, convenience, necessities of international intercourse between individuals, and, as has occasionally been said,¹⁸ an enlightened conception of public policy itself.

Private international law is characterized by a distinction between substantive law and rules of conflicts and between substantive rules and rules of reference. Conflict of laws rules have been assigned the task of accommodating the substantive legal norms of different countries in international private interactions. In a dispute with an international dimension, there is a dilemma between "conflict justice" and "material justice." This dilemma is in fact less philosophical and more methodological as both forms of justice are about corrective justice, though the former is more concerned with the form and structure and the latter is more concerned with contents and results. The question is:

Should the choice-of-law process aim to find the proper law . . . without regard to the quality of the result it produces, or should it aim for the proper result, i.e., a result that produces the same quality of justice in the individual case as is expected in fully domestic, non-conflicts cases?¹⁹

As far as corrective justice is concerned, the justice in conflict of laws rules in the area of tort and contract law is the same kind of justice which is embodied in tort and contract law.

Regardless of which approach this scheme has been built on, and of whether conflict justice or material justice should prevail, a fundamental assumption is that substantive laws of foreign origin have a private and neutral character and are equal to those of the forum. Basically, there are two types of substantive goals for all rules: regulatory policies designed to maximize the general wel-

¹⁷ See MICHAEL J. WHINCOP & MARY KEYES, *POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS* 9 (2001) ("Parties should be able to resolve choice of law and jurisdictional problems contractually, even where this would limit the scope of national laws.").

¹⁸ See M. Jantera-Jareborg, *Foreign Law in National Courts: A Comparative Perspective*, 304 RECUEIL DES COURS 185, 194 (2003).

¹⁹ Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, 298 RECUEIL DES COURS 9, 397 (2002).

fare, and rights-based rules designed to secure corrective justice. Under welfare regulatory policies, consequentialist rules are to achieve the social goals of maximizing social utility, promoting the general welfare, or furthering economic efficiency. According to Singer, "[i]n contrast, rights-based policies are not justified because of their consequences for society as a whole but because they embody the community's sense of justice by defining moral obligations within social relationships."²⁰ Conflict justice is basically about the rights-based rules. In principle, conflict rules deal only with neutral and private laws, which reflect the sense of justice of a particular nation, but are not designed to achieve objectives beyond justice in bipolar private relations. This could be pursued either through substantive laws or through rules of conflict of laws. This assumption is thus extended to consider conflict rules as free of any distributional motives. Private international law is, therefore, just a reflection of domestic corrective justice and a mechanism to promote a global harmony.

There are some theories of conflict of laws which are policy-oriented and make room for the former categories of rules. The developments discussed above would make the choice of a conflict of laws system a complex one. The transformation of the nature of social interactions has already affected legal forms. Formal and abstract rules are giving way to more substantive, complex, and socially-oriented rules. The underlying objectives of rules are increasingly related to the social place of individuals, whereas under the formal and abstract rules individuals were detached and isolated from their social position. Modern societies mainly function through legal devices which intertwine corrective justice with a social welfare scheme (e.g., protection of the weaker party and the particularization process) or pursue pure public interest (e.g., competition law).²¹ These developments may suggest that the conflict of laws rules should be based on policies and distributive objectives. There have been suggestions that the objectives of a choice of law regime should be to "provide a legal ordering that goes as far as possible toward maximizing global welfare" and resolving

²⁰ Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 35 (1989). See generally Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) (seeking to outline the most plausible rights-based approach to choice of law).

²¹ See Vaughan Black, *Consumer Protection in the Conflict of Laws: Canada, the United States, and Europe*, in CONSUMER LAW IN THE GLOBAL ECONOMY: NATIONAL AND INTERNATIONAL DIMENSIONS 195, 197 (Iain Ramsay ed., 1997) (offering consumer protection laws as an example of both legal devices).

conflicts in way that would optimize the aggregate utility of those individuals as well as the societies that are affected.²²

If there is such a widespread policy injection into the legal scene, a crisis in private international law is inevitable. The international reach of regulatory laws and the use of private law as a mechanism for implementation of policy objectives pose a challenge for private international law and theories of conflict of laws. The idea of pursuing welfare objectives through contract or tort law has huge implications for private international law. In the face of these developments, we need to evaluate the current conflict of laws mechanisms in handling such multifaceted disputes.

The question of adaptability of conflict rules to such an intricate state of affairs is more complicated if we consider the phenomena of globalization and developments which are taking place in international relations.²³ Over the last two decades there has been a huge transformation from relatively independent national systems separated by legal and geographical barriers to an interdependent and integrated global society in which individuals enjoy far more opportunities. The advent of advanced communications, media, and the liberalization of economic activities across national borders, which have loosened national boundaries, symbolize the beginning of an era of exchange far ahead of legal frameworks. Nowadays, labor migration across borders, service transactions, as well as capital flows and payments from one country to another have become very common.²⁴ As far as regulatory policies are concerned, globalization has intensified the dialectic in which public and private actors are engaged in a continuous struggle between freedom and order and autonomy and welfare. Similarly, the diversification of political and economic geography brought about by globalization has created a structural imbalance between the public

²² Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 885 (2002); see generally Erin Ann O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941 (2002) (commending and responding to Guzman, noting that public choice theory complicates any conflicts of laws analysis).

²³ See THE INTERNATIONAL SYMPOSIUM ON CIVIL JUSTICE IN THE ERA OF GLOBALIZATION: COLLECTED REPORTS (Editorial Board of the ISCI ed., 1993) (discussing the growing trend toward the globalization of private civil disputes).

²⁴ See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 2* (1969) (observing that international events have "engendered both greater interdependence among nations and profound dislocations in the established order of things . . .").

and the private spheres of society, complicating the application of corrective and distributive justice.²⁵

In some areas parochial views are fading away and certain universal norms are emerging, but many legal devices are designed to implement essentially national welfare objectives whose extraterritorial application would inevitably create jurisdictional conflicts. Although all national laws are *prima facie* territorial and should not be applied extraterritorially, there is a long tradition of application of private and neutral laws of one country in another country. As far as public international law is concerned, this form of extraterritoriality has never been an issue. Through conflict of laws rules and adjudicative or administrative procedures, many states allow the application of foreign private law in their territory, but they have been reluctant to give effect to laws that pursue welfare objectives. It is, therefore, wrong to rely on conflict of laws principles in determining the extraterritorial scope of regulatory and welfare-oriented laws, as conflict of laws rules are exclusively applied to private law issues.²⁶ The premise that the limits of a nation's capacity to regulate economic matters are set by public international law conceives the issue as one of jurisdiction rather than choice of law. Public international law, however, is not capable in its old structure of dealing with these issues. Several factors have made the operation of convenient principles such as territoriality and nationality almost impractical. The advent of economic regulations, the blurring the public/private law distinction, the phenomenon of globalization, and the proliferation of multinational enterprises requires alternative means of allocation of jurisdiction and conflicts issues.²⁷

²⁵ See Michael J. Shapiro, *Sovereignty and Exchange in the Orders of Modernity*, in *THE THEORETICAL EVOLUTION OF INTERNATIONAL POLITICAL ECONOMY* 309 (George T. Crane & Abba Amawi eds., 2d ed. 1997) (discussing tensions between national sovereignty and modern formulations of exchange).

²⁶ See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 *HARV. INT'L L.J.* 101, 105-06 (1998) (pointing out that one weakness of multilateral approaches to extraterritoriality is that they result in under-enforcement of some welfare-oriented laws, such as competition laws).

²⁷ See Kenneth W. Dam, *Economic and Political Aspects of Extraterritoriality*, 19 *INT'L LAW.* 887 (1985) (examining the extraterritoriality problem in commercial and financial relations and in national security and foreign policy trade controls); Tom Harris, *The Extraterritorial Application of U.S. Export Controls: A British Perspective*, 19 *N.Y.U. J. INT'L L. & POL.* 959, 966 (1987) (noting that conflicting regulations in various countries present difficulties to multinational corporations); Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law,*

These developments also require an evaluation of the utility of the most common conflict of laws systems.²⁸ The question is whether rules of conflict of laws have to be aligned with the policies and principles which underpin contract or tort law. Should the conflict of laws rules follow policy objectives? If contract and tort law are meant to follow welfare objectives, what would be the orientation of conflict of laws rules? Do they pursue the same objectives at different levels? Could conflict of laws rules help to identify the international reach of regulatory laws?

4. METHODOLOGIES FOR RESOLUTION OF DISPUTES WITH PUBLIC INTEREST DIMENSION

4.1. *Proper Law Theory*

In England the proper law theory of contract has been almost entirely replaced by the provisions of the Rome Convention²⁹ but it has been recognized and followed all over the world and is still an influential theory in many other common law jurisdictions.³⁰ Moreover, the United Kingdom, under Article 22(1)(a) of the Convention, has reserved the right not to apply certain parts of the Convention such as Article 7(1).³¹ These factors and also theoretical reasons justify the evaluation of the English proper law theory in the current context.

In the face of the above developments in the law and the implications for private international law, English conflict of laws orientation and response is not that clear. Apart from the role that international public policy plays in hedging against foreign private

and Some Suggestions for Their Interaction, 163 RECUEIL DES COURS 311, 328–29, 333–35 (1979) (providing and illustrating criteria for legislative jurisdiction).

²⁸ Black suggests that the rules of private international law have long exhibited features which have more recently come to be seen as an outcome of globalization. Black, *supra* note 21, at 196–97.

²⁹ See Contracts (Applicable Law) Act, 1990, c. 36, sched. 1–3 (Eng.) (providing the date, April 1, 1991, when the Convention on the Law Applicable to Contractual Obligations was brought into force in England).

³⁰ F.A. Mann, *The Proper Law of the Contract—An Obituary*, 107 LAW Q. REV. 353 (1991).

³¹ See T.C. Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, 266 RECUEIL DES COURS 337, 369–70 (1997) (“Article 7 (1) [of the Rome Convention] deals with internationally mandatory rules of foreign countries and permits, but does not require, the forum to give effect to them, even if the contract is governed by the law of another country.”).

law, it seems that rules of conflict of laws under English law have never had a mission to implement regulatory laws or accommodate policy objectives in contract or tort.³² Case law and statute law developments in England do not show any sign of the utilitarian inclination.³³ However, utilitarian ideas could be traced in the English conflict of laws approach to the illegality of contracts and the place of forum or foreign mandatory rules in private litigation as well as an inclination towards devising workable rules for the benefit of the public.³⁴ Although there is no consistent practice, the evidence of English conflict of laws inclination towards a less neutral approach in dealing with regulatory laws could be seen in some cases. For example, one view in some common law jurisdictions is that a mandatory rule shall not be applied unless it is part of the law of the forum or forms part of the governing law of the contract.³⁵ This could be seen as the prevalence of corrective justice

³² See Megan Richardson, *Policy versus Pragmatism? Some Economics of Conflict of Laws*, 31 COMMON L. WORLD REV. 189 (2002) (suggesting that British precedent on conflict of law has not been the result of a particular cohesive economic or public policy philosophy).

³³ C.M.V. CLARKSON & JONATHAN HILL, *JAFFEY ON THE CONFLICT OF LAWS* 253–78 (2d ed. 2002). See also C.G.J. MORSE, 2 PROBLEMS IN INTERNATIONAL LAW: TORTS IN PRIVATE INTERNATIONAL LAW 279 (R.H. Graveson ed., 1978). Morse discusses Dr. J.H.C. Morris' suggestion that English courts have reached results which in the whole seem commercially convenient and sound by applying the proper law doctrine to the question whether the defendant is liable for breach of contract. Why should not we reach the results which are socially convenient and sound by applying the proper law doctrine to the question whether the defendant is liable for tort?

Adoption of the proper law of the tort would enable a court to choose '... the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation ...' before it. While such an approach might often result in the application of *lex loci delicti*, this would not be an [absolute] solution.

Id. (quoting J.H.C. Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881, 888 (1951)).

³⁴ The last 30 years have witnessed a new phenomenon with the increased politicization of change in this field of private international law. See Peter North, *Private International Law: Change or Decay?*, 50 INT'L & COMP. L.Q. 477 (2001) (reviewing the changes in private international law).

³⁵ Ole Lando, *International Encyclopedia of Comparative Law – Chapter 24: Contracts*, in 3 PRIVATE INTERNATIONAL LAW 112 (Kurt Lipstein ed., 1976); see also EDWARD I. SYKES & MICHAEL C. PRYLES, *AUSTRALIAN PRIVATE INTERNATIONAL LAW* 546 (2d ed. 1987) (surveying Australian precedent); F.A. Mann, *Proper Law and Illegality in Private International Law*, 18 BRIT. Y.B. INT'L L. 97, 113 (1937) [hereinafter Mann, *Proper Law and Illegality*] (analyzing English treatment of public policy in contract law). The control of proper law also means that its mandatory rules ap-

over welfare objectives and distributive justice.³⁶ The Editors of DICEY AND MORRIS ON THE CONFLICT OF LAWS (11th edition) maintained that “where [a mandatory] law is neither legislation of the forum nor of the applicable law [proper law] it has no application [in England].”³⁷ Following this approach in some cases the applicability or inapplicability of regulatory rules has been conditioned on whether they were part of the proper law,³⁸ though this has not been the case in some other occasions, where a foreign public policy law representing a legitimate interest was applied irrespective of the law governing the contract.³⁹ This perception may suggest

ply and override the terms of the contract. See F.A. Mann, *The Proper Law in the Conflict of Laws*, 36 INT’L & COMP. L.Q., 437-51 (1987) [hereinafter Mann, *Proper Law in Conflict of Laws*] (discussing the meaning and authority of proper law); F.A. MANN, *THE LEGAL ASPECT OF MONEY*, 397-408 (5th ed. 1992) [hereinafter MANN, *LEGAL ASPECT OF MONEY*].

³⁶ See 69 MARC-ANDRE RENOLD, *LES CONFLICTS DE LOIS EN DROIT ANTITRUST* [CONFLICT OF LAWS IN ANTITRUST LAW], 54-55 (1991) (arguing that antitrust law’s approach is more similar to police law than to the recognition of private rights common in international civil law).

³⁷ 1 DICEY AND MORRIS ON THE CONFLICT OF LAWS, 21-22 (Lawrence Collins ed., 11th ed. 1987). However, in the most recent edition, it is said that: “To permit the application of mandatory rules of a country which is neither the forum nor that of the applicable law is to introduce unacceptable uncertainty into a set of already flexible rules.” 2 DICEY AND MORRIS ON CONFLICT OF LAWS 1559 (Lawrence Collins ed., 13th ed. 2000).

³⁸ See, e.g., *Libyan Arab Foreign Bank v. Bankers Trust Co.*, (1989) 1 Q.B. 728; *Rossano v. Mfr. Life Ins. Co.*, (1963) 2 Q.B. 352; *Kahler v. Midland Bank, Ltd.*, (1950) A.C. 24; *Zivnostenska Banka Nat’l Corp. v. Frankman*, (1950) A.C. 57; see also F.A. Mann, *Nazi Spoliation in Czechoslovakia*, 13 MOD. L. REV. 206 (1950) (holding that proper law be applied despite the resulting seeming injustice of the ruling); Campbell McLachlan, *Splitting the Proper Law in Private International Law*, 61 BRIT. Y.B. INT’L L. 311, 327-32 (1990) (debating the existence of split proper law in certain contract situations). As far as exchange control regulation is concerned, prior to the conclusion of IMF Agreement (Art. VIII(2)), the regulation could not be given effect if the proper law of contract was English law and the place of payment was not the territory of the enacting country. Cf. *Ralli Bros. v. Compania Naviera Sota y Aznar*, (1920) 2 K.B. 287 (holding that parties cannot be bound by aspects of contract that violate the law of the place of performance); *Wilson, Smithett & Cope, Ltd. v. Terruzzi*, (1976) Q.B. 683 (holding that English courts would enforce a contract executed in Italy, ignoring an agreement which might have negated the contract’s enforceability).

³⁹ See *Regazzoni v. K.C. Sethia, Ltd.*, (1958) A.C. 301 (holding that English courts reserve the right to select exceptions to their general policy of following proper law); *Foster v. Driscoll*, (1929) 1 K.B. 470; *Euro-Diam, Ltd. v. Bathurst*, (1987) 2 W.L.R. 1368 (Q.B.) (ruling that criminal offence under German tax law was not relevant to rendering an insurance contract illegal); *Howard v. Shirlstar Container Transp., Ltd.*, (1990) 1 W.L.R. 1292 (C.A.) (ruling that illegality did not deprive one of the parties a claim to his fee); see also *Lemenda Trading Co. v. African Middle East Petroleum Co.*, (1988) 1 Q.B. 448; Hartley, *supra* note 31, at 353.

that regulatory laws, like currency exchange laws and similar regulations, will apply to the contract if its proper law is found to be that of the country which has such regulations.⁴⁰

Under the proper law theory the impact of regulatory laws has been generally dealt within the context of illegality of contract.⁴¹ Illegality claims are useful tests to assess how the proper law theory responds when regulation and welfare values are invoked in a private dispute. According to North and Fawcett, "it is axiomatic that a contract void for illegality under its proper law must be regarded as a nullity; this is so even if the illegality is based upon the revenue laws of that legal system."⁴²

Another understanding of the proper law theory, however, favors a determination of regulatory laws independent of the proper law applicable to the contractual matters.⁴³ In other words mandatory rules are not subordinated to the proper law.⁴⁴ In some cases involving illegality under a foreign law, English courts have emphasized that a choice of law by parties should not, in principle, prevent the application of the regulatory rules of another country

⁴⁰ See 13 DICEY AND MORRIS ON THE CONFLICT OF LAWS 1600 (Lawrence Collins et al. eds., 2000) (providing Rule 210 and commentary). For more details about this approach see Mann, *supra* note 30, at 437-51; MANN, LEGAL ASPECT OF MONEY, *supra* note 35, at 397-408. See also Lando, *supra* note 35, at 112; Vita Food Products Inc. v. Unus Shipping Co. Ltd., (1939) A.C. 277 (discussing conflicts between English and foreign law). Although this view may give the impression that mandatory rules apply only if the governing law is that of England it is nonetheless unlikely that an English court would interpret it in this way. Cf. Hartley, *supra* note 31, at 348.

⁴¹ See Carter, *supra* note 2, at 28; Deutsche Rückversicherung AG v. Wallbrook Ins. Co., (1996) 1 W.L.R. 1152 (C.A.) (discussing whether regulatory laws have the power to control the enforceability of contracts originally created illegally).

⁴² PETER M. NORTH & JAMES J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 483 (11th ed. 1987). Due to the influence of the Rome Convention this approach has been slightly changed in the 1999 edition. See PETER M. NORTH & JAMES J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 600-03 (13th ed. 1999).

⁴³ See Joost Blom, *Choice of Law Methods in the Private International Law of Contract*, 18 CAN. Y.B. INT'L L. 161, 162 (1980) (arguing that allowing parties' interests to be served is more important than policy concerns); A.F.M. Maniruzzaman, *International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview*, 7 J. INT'L ARB. 53, 58 (1990) (arguing that the application of regulatory rules is based on general private international law).

⁴⁴ See Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligation*, 24 COMMON MKT. L. REV. 159, 212 (1987) (discussing contract techniques that preclude evasion of mandatory rules through the manipulation of proper law).

with which the transaction has a close connection.⁴⁵ Hence, the principle that the proper law of contract governs all questions is not absolute. The exception is that the forum might refuse to enforce a contract if the intention of the parties is to perform an act in a foreign and friendly country, which is illegal by the law of such country.⁴⁶ In such a situation the applicability or inapplicability of regulatory public law rules takes place regardless of what is the proper law.⁴⁷

The expansion and contraction of the scope of the proper law and inclusion or exclusions of the public policy objectives shows the position of the proper law theory toward the corrective and distributive justice distinction. However, the unitary character of the proper law, which causes ambiguity, implies that it could virtually be the exclusive source of private law and regulatory rules applicable to a private dispute.⁴⁸ This ambiguity over the coverage of proper law perhaps stems from both the methods and objectives used in determining the applicable law. Whilst a subjective method gives priority to the intention of the parties and corrective justice,⁴⁹

⁴⁵ See *The Hollandia*, (1983) A.C. 565 (discussing the relevance of an exclusive jurisdiction clause in English court); *Lemenda Trading Co., Ltd. v. African Middle East Petroleum Co.*, (1988) 1 Q.B. 448 (holding that English courts would not enforce a contract that was to be performed in another country and went against English public and moral policy); *Royal Boskalis Westminster NV v. Mountain*, (1999) Q.B. 674 (factoring duress into the considerations); *Regazzoni v. K.C. Sethia, (1944), Ltd.*, (1958) A.C. 301 (providing authority for the proposition that public policy will avoid at least some contracts which violate the laws of a foreign state); see also *Kahler v. Midland Bank, Ltd.*, (1950) A.C. 24 (stating that it should not be considered a defense in English court that court enforcement should be swayed by the prospect of parties' subsequent penalization by their national legal system).

⁴⁶ Mann, *Proper Law and Illegality*, *supra* note 35, at 113. See *Zivnostenska Banka Nat'l Corp. v. Frankman*, (1950) A.C. 57 (holding that courts would refuse to enforce an illegal performance of banking transfers).

⁴⁷ See F.A. Mann, *Conflict of Laws and Public Law*, 132 RECUEIL DES COURS 107, 123-24 (1971) (discussing examples and rules of when proper law will not suffice to legalize certain locally outlawed behaviors).

⁴⁸ See A.J.E. Jaffey, *Essential Validity of Contracts in the English Conflict of Laws*, 23 INT'L & COMP. L.Q. 1 (1974) (arguing that only proper law can invalidate an international contract).

⁴⁹ See Mann, *supra* note 30, at 353; *Mount Albert Borough Council v. Australian Temperance*, (1937) 4 All E.R. 206, 213 (per Lord Wright, who stated that "English law . . . has refused to treat as conclusive rigid or arbitrary criteria such as *lex contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties, to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts") (emphasis added).

an objective one seeks to determine the proper law on the basis of the place where the contract is localized.⁵⁰ Under such an objective approach there might not be a distinction between corrective and distributive justice elements of a foreign or domestic law, which is considered to be the applicable law.

Rules of the conflict of laws, which lay down connecting factors to localize a disputed issue, are useful to the extent that they would not be contrary to the forum's corrective justice, not the policy objectives of the forum. The whole idea of conflict systems in private law is founded on corrective justice. Therefore, superiority of a subjective method, if possible, is the logical result of such a conviction. So far as corrective justice is concerned, a physical connection between a place where a contract is concluded or performed cannot always support the presumption that the law of such a place could govern the contract. It is, of course, an indicator that can help to identify the applicable corrective justice, but it is not a conclusive factor equivalent to an express or even implied choice by the parties. After all, a choice of the law of the place with the closest and most real connection should also represent a law which is closest to corrective justice between the parties. For this reason, the *lex mercatoria* could be the applicable corrective justice although it is not a legal system to which the transaction could objectively be connected, closely or otherwise. Some judges, however, have noted the discrepancy between applying a "purely" objective test and applying one that is oriented towards the interests of the parties. In a number of cases the "closest connection" test has been put aside and, instead, a law which was more likely to deliver justice between the parties has been preferred.⁵¹

⁵⁰ See PETER M. NORTH & JAMES J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 458 (12th ed. 1992) (contrasting examples of rigid tests based on location with examples of flexible tests in which parties are free to choose the governing law); see also PETER NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 171-72 (1993) (discussing the difference between direct and indirect choices in choice-of-law situations).

⁵¹ See, e.g., *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.*, (1984) 1 A.C. 50 (holding that the jurisdiction of a dispute between two foreign companies regarding an insurance policy written in English was subject to English law under a "proper law" analysis, since the terms were adopted almost completely from an English form policy scheduled to English law); *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah Nat'l Oil Co.*, (1990) A.C. 295 (holding that the intent of the parties in signing the agreement, as well as the terms of the agreement, stipulated ICC arbitration in Geneva using the Swiss law chosen by the arbitrators); *Armadora Occidental SA v. Horace Mann Ins. Co.*, (1977) 1 W.L.R. 1098 (C.A.) (holding in a dispute between a Panamanian and an American

As far as the regulatory laws are concerned, either method of determining proper law may take an excessive turn in terms of an unjustified inclusion or exclusion of the regulatory public law. A subjective approach is apt to prejudice the application of regulatory public law while an objective approach to the selection of law may lead to haphazard application of regulatory law and not achieve justice between the parties.⁵² Although, in the context of a regulatory public law dispute, a combination of these methods might happen, there is always a risk of giving inappropriate weight to either of these factors at the expense of the others. Ascertaining the nature of the legislation as being corrective or distributive justice could reduce this risk, but a more consistent, comprehensive and systematic approach has yet to be worked out.⁵³

4.2. Governmental Interest Analysis

Classical conflict of laws was dominated by formalism and the belief that a relatively small number of simple rules could cover the entire field of conflict of laws.⁵⁴ Neutral and objective conflict of laws rules tell the court which law to apply. Under the classical

company over the use of English law, that in the “closest connection” test, the underlying intent of a “follow London” clause in insurance policies underwritten by the American party implies that English law governs); *Coast Lines Ltd. v. Hudig & Veder Chartering NV*, (1972) 2 Q.B. 34 (holding that the decisive factor for proper law of contract in a dispute between English and Dutch parties, as determined by the “closest connection” test, was English because the contract contained an exemption clause valid under English law but invalid under Dutch law). The doctrine of the “proper law” of the contract in this sense reflects the doctrine of party autonomy, the underlying basis of English contract law itself. See also Blom, *supra* note 43, at 161–62 (arguing that the proper law approach seen in English conflicts rules extends from the “distinctive character of English law” emphasizing party autonomy); Mann, *Proper Law in Conflict of Laws*, *supra* note 35, at 443–45 (explaining the origins of the English proper law approach).

⁵² See generally E.J. Cohn, *The Objectivist Practice on the Proper Law of Contract*, 6 INT’L & COMP. L.Q. 373 (1957) (discussing the difference between the objectivist theory on the proper law of contract that presumes the intent of the parties via some significant connection to a particular jurisdiction in the terms of the contract, one which mirrors classic conflicts theory, and one that substitutes such presumed intent by objectively looking at the law which has the closest connection to the contract).

⁵³ See Lando, *supra* note 35, at 112.

⁵⁴ See Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963) (noting that it was generally believed that at the time of the creation of the original Restatement, the field could be explained by a “relatively small number of simple rules”). The doctrine of proper law, owing to its ambiguity, was “sufficiently flexible that . . . it yielded acceptable results in most of the cases.” Blom, *supra* note 43, at 162.

theories, formal rules obviated the need to examine the needs of international commerce and substantive objectives. Associating legal relationships to legal systems with simple rules could satisfy justice. The idea was that the location of some single significant factor in a transaction would identify the place (state) whose law would govern the transaction.⁵⁵ However, critics maintained that it was rarely possible to state concrete rules which could be applied to all situations.⁵⁶ For example, the assumptions that the only law which can attach legal consequences to acts or events is the "law of the place of contracting" or that the choice of a law to govern a contract should be among those laws which have some connection with the contract have been described as arbitrary and artificial.⁵⁷ There has been a general dissatisfaction with the inconsistent results of the conventional approach. Its deficiencies in offering a coherent system have also been highlighted with respect to characterization, the incidental question, *depeçage*, public policy, and *renvoi*.⁵⁸

⁵⁵ See JUENGER, *supra* note 15, at 47 (noting that conflicts would be resolved by "allocating legal relationships to those legal systems in which they have their 'seat'"); see also Gerhard Kegel, *International Encyclopedia of Comparative Law—Chapter 3: Fundamental Approaches*, in 3 PRIVATE INTERNATIONAL LAW 3-14 (Kurt Lipstein ed., 1986) (exploring legal policy implications of, and purposes for, private international law). In the United States, these rules made up the conflict rules codified by the American Law Institute in the original Restatement. See also ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 255-56 (4th ed. 1986) (noting that the first Restatement of Conflict of Laws was developed on the idea that the location of a "single significant factor" would decide the choice of law in a given dispute); see also Reese, *supra* note 54, at 679 (noting that at the time of the creation of the original Restatement, "validity of a contract [was] governed by the law of the place of contracting and that rights and liabilities in tort [were] determined by the law of the place of injury"); *id.* at 680 ("It soon became apparent that many of the rules stated in this Restatement and their underlying theories were wrong or at least so oversimplified as to be misleading."); WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 353, 355, 358-59, 380-81, 392 (1949) (discussing the problematic consequences of such simplified rules in a series of hypothetical situations).

⁵⁶ See REESE, *supra* note 54, at 679-80 (highlighting the fact that critics disagreed with the reasons for the rules but did not disagree with the rules themselves).

⁵⁷ See COOK, *supra* note 55, at 353, 355, 358-59, 380-81, 392 (noting, through hypothetical situations, that such laws as recorded in the Restatement seemed arbitrary).

⁵⁸ See generally JUENGER, *supra* note 15, at 71-81 (highlighting such conundrums in the traditionalists' approach). As René David said, the proponents of conventional conflict of laws "cling to this method, seeking to perpetuate its use even in cases where it is manifestly bad: they are 'conflictualists' and not true 'internationalists.'" René David, *International Encyclopedia of Comparative Law—*

The emergence of regulatory laws and pursuance of public interest in contract or tort rules further proved the inadequacy of a system that could not provide firm guidance for the impact of unprecedented proliferation of regulatory laws and welfare values in private law.⁵⁹ Savigny thought that the domain of regulatory law would shrink and he considered it as “anomalous” and expected it to fade away. On the contrary and in spite of his expectation, state intervention and the growth of regulatory law proved that Savigny was wrong.⁶⁰ Private disputes weaving public and private interests have changed the nature of private international law problems. Private international law, therefore, needs to determine the legitimate interests of individuals and states in one single dispute.⁶¹

These developments encouraged conflicts scholars to abandon classical conflict rules and to engage in an interest analysis process.⁶² While moderate advocates of interest analysis would retain the conventional methods and support major modifications, such as replacement of the broad categories with narrower and more specific subdivisions which would be more sensitive to individual cases,⁶³ a more radical version of interest analysis favors the com-

Chapter 5: *The International Unification of Private Law*, in 2 PRIVATE INTERNATIONAL LAW 25 (Kurt Lipstein ed., 1971).

⁵⁹ See JUENGER, *supra* note 15, at 68, 82 (noting the various situations in which application of the situs rule—including frequently-occurring multi-state problems such as contracts, marriages, divorces, and accidents, as well as complications from extension of public law in areas such as export controls, antitrust, and securities litigation—produce unsatisfactory results); Jürgen Basedow, *Private Law Effects of Foreign Export Controls: An International Case Report*, 27 GERMAN Y.B. INT’L L. 109, 111 (1984) (describing various regulation-laden categories of public law characteristic of the welfare state that cannot be sufficiently addressed with a more classic conflicts approach).

⁶⁰ See JUENGER, *supra* note 15, at 68, 82 (noting that the emergence of the modern welfare state complicated the ability for simpler, more ambiguous rules to effectively determine which law should be applied).

⁶¹ See generally ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 1–28 (1996) (discussing growing influence of public law problems in private law disputes).

⁶² See WILLIAM TETLEY, INTERNATIONAL CONFLICT OF LAWS 11–22 (1994) (describing the progression in American law from classic conflicts analysis to interest-based conflicts analysis).

⁶³ Cf. J.H.C. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881, 892 (1951) (suggesting that something similar to the proper law doctrine as it is applied to the law of contracts might be applicable to the law of torts only if such proper law would “break down problems into smaller groups and thus facilitate a more adequate analysis”).

plete abolition of conflict rules and seeks to find the underlying policies of rules of private law and the policy of their international application. Instead of relying on a separate body of choice of law norms, it is argued that conflict problems should be resolved directly by an analysis of the substantive rules and policies that potentially apply to the case at hand. Under this approach the rules of private law are considered as having a social mission.⁶⁴

Under a more utilitarian approach, the idea that conflict problems call for an analysis of the reach of local rules implies that all rules of law are the product of policies.⁶⁵ Every state deliberately utilizes its substantive law in order to achieve the fulfillment of a certain goal or "policy." Such policy may be "social, economic or administrative."⁶⁶ Brainerd Currie, a leading advocate of interest analysis, theorized that states have an "interest" in implementing the policies underlying their laws by applying them to local and, in appropriate situations, international transactions. He called these interests "governmental."⁶⁷ Although Currie tried to distinguish an altruistic interest of a state in the application of its laws (corrective justice) from a real governmental interest (distributive justice),⁶⁸ it is difficult to avoid misunderstanding what he meant by

⁶⁴ See JUENGER, *supra* note 15, at 98-99 (highlighting governmental interest analysis, which emphasizes the rights of the sovereign state to assert its interest in determining applicable law, depending upon the state's interest in the rule's underlying policy).

⁶⁵ See Reese, *supra* note 54, at 679-81 (noting that the scope of rules become relevant since policies are developed through distributive justice principles).

⁶⁶ BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 189 (1963) [hereinafter CURRIE, *Constitution and Choice of Law*].

⁶⁷ See BRAINERD CURRIE, *On the Displacement of the Law of the Forum*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 66, at 3, 53 [hereinafter CURRIE, *Law of the Forum*] (noting governmental interests in determining forum); BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 66, at 77, 89, 94, 112 (noting governmental interest in contract dispute fora for non-resident married women); see also BRAINERD CURRIE, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 66, at 445, 447 [hereinafter CURRIE, *Unconstitutional Discrimination*] (acknowledging that governmental interest "must yield whenever it comes into conflict with the constitutional prohibitions against discrimination" or with a "deliberately reasoned policy of making the benefits of domestic law available to all persons"). In *Gates v. Claret*, 945 F.2d 102 (5th Cir. 1991), the court of appeals noticed that the choice of law rules of the forum state, Louisiana, are controlling. Louisiana employs a two-step "interest analysis." First, the court employs a "governmental interest" analysis to determine whether false or true conflict exists. *Id.* at 104.

⁶⁸ See CURRIE, *Unconstitutional Discrimination*, *supra* note 67, at 489 (explaining

governmental interest. The governmental interest analysis seems to be the natural extension of the utilitarian theories of contract and tort law discussed above. It reflects a deeper and more general transformation at the domestic level. In fact, the practical outcomes of the theories discussed above are more tangible in an international context.

The main theme of criticism of conventional conflict rules points to their shortcomings in overlooking "governmental interest" in private conflicts.⁶⁹ Currie argues that these rules were likely to subvert the forum's interests without advancing those of any other state.⁷⁰ The state has an interest in the effectuation and application of its policy. Currie regarded courts as instruments of the sovereign, which have a duty to promote the forum's interest notwithstanding any countervailing foreign concern.⁷¹ Unlike the classical system and the proper law approach, Currie's analysis does not primarily focus on the contacts of a transaction with a given legal system. Instead, it emphasizes the purpose of substantive rules and rights of states to effectuate these purposes.⁷² This is the essence of Currie's "governmental interest."⁷³

These developments and the emergence of interest analysis in general should be welcomed in the course of the search for a methodology for regulatory conflicts where public interest occupies a paramount place in private litigation. Although the governmental interest theory has been developed in the context of ordinary pri-

an "altruistic interest" as a state's interest in the application of its law that, nonetheless, is not reasonably necessary for effectuation of the specific policy embodied in the law).

⁶⁹ CURRIE, *Constitution and Choice of Law*, *supra* note 66, at 279 ("The traditional system largely ignores governmental interests.").

⁷⁰ See *id.* (advising that courts should be "realistic[]" in appraising the likelihood that applying foreign law will effect interstate stability).

⁷¹ See BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 66, at 177, 181-82 (arguing that when a state court applies foreign law, it necessarily holds the interest of the forum state inferior to the interest of the foreign state).

⁷² See WILLIS L.M. REESE, MAURICE ROSENBERG & PETER HAY, *CASES AND MATERIALS ON CONFLICT OF LAWS* 487-89 (9th ed. 1990) (summarizing Currie's governmental interests analysis as a series of steps which collectively tend to favor applying the law of the forum state).

⁷³ See generally Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 755, 765, 770, 774, 779, 780, 782, 784 (1963) (describing situations that give rise to a governmental interest analysis). This attitude towards a conflict of laws system is closely connected to the utilitarian interpretation of private law.

vate law disputes, it can contribute to the resolution of regulatory disputes but would certainly complicate the disputes revolving around pure private law rules. The advantage of interest analysis in general is that it avoids formalism and the pointless application of substantive law.⁷⁴ However, critics argue that "even if the purposes of a rule can be discovered, the rule's geographical reach is not apparent."⁷⁵ Critics, furthermore, argue that the governmental interest of which Currie and his followers speak in the private law context is nearly imaginary. Lowenfeld points out that "governments (as contrasted with courts) do not really care about whether the driver of an automobile is liable to a passenger in the case of an accident" whereas in public law areas such as economic regulations, public safety, or national security there is a real governmental interest.⁷⁶

Obviously, according to a corrective justice approach to private law, "many rules of domestic private law are not primarily designed to protect the public interest" ⁷⁷ In the absence of collective welfare values, states are not directly interested in the outcomes of private disputes.⁷⁸ For example, the purpose of rules of contract or tort law is not to advance states' public interests. Jaffey explains that "[t]he function of such rules . . . is to achieve a just solution between the parties, which may mean, in the contractual context, the commercially convenient or expedient solution."⁷⁹

⁷⁴ See A.J.E. JAFFEY, *INTRODUCTION TO THE CONFLICT OF LAWS* 268 (1988) (discussing interest analysis' determination of relevance); George A. Bermann, *Public Law in the Conflict of Laws*, 34 AM. J. COMP. L. SUPP. 157, 169-72 (1986) (discussing American use interest analysis in determining forum).

⁷⁵ Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 495 (1985). Though with his forum policy preferences, Currie can comfortably avoid this challenge. For discussion of this issue, see Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) (arguing that Currie's logic does not prove legislative intent); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 35-36 (1984) (discussing the dissatisfactory geographical implications of interest analysis).

⁷⁶ Lowenfeld, *supra* note 27, at 311, 335. But see *Glenway Indus., Inc. v. Wheelabrator-Frye, Inc.*, 686 F.2d 415, 417 (6th Cir. 1982) (serving as an example of governmental interest in private law).

⁷⁷ JAFFEY, *supra* note 74, at 270.

⁷⁸ See CURRIE, *Law of the Forum*, *supra* note 66, at 64 (explaining that Currie's legal realism is a conception of the law as "an instrument of social control").

⁷⁹ A.J.E. Jaffey, *Choice of Law in Relation to Ius Dispositivum with Particular Reference to the E.E.C. Convention on the Law Applicable to Contractual Obligations*, in *CONTRACT CONFLICTS—THE E.E.C. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY* 33, 34 (P.M. North ed., 1982)

The basic error of the many theories, including governmental interest theory, which attempted to explain why foreign law should be applied at all,⁸⁰ is that “[t]hey all place too much stress on the concept of sovereignty and neglect the difference between state’s interests and the search for [corrective] justice inherent in private law!”⁸¹ Particularly, under the governmental interest approach, private interests have been excessively overlooked.⁸² An approach strictly focusing on governmental socio-economic interests (welfare values) is prone to ignore the fairness to the individual litigants.⁸³ Juenger contends that Currie ignored “real” governmental interests and wasted his time concentrating on “spurious” governmental interests in private law litigation.⁸⁴ In-

[hereinafter CONTRACT CONFLICTS]. See also R.H. Graveson, *Philosophical Aspects of the English Conflict of Laws*, 78 L. Q. REV. 337, 349, 352, 354, 370 (1962) (explaining that the purpose of aspects of contract or tort law in the context of conflict of laws is to find a convenient solution).

⁸⁰ According to Kegel, a European conflict scholar::

The state has an altruistic rather than egoistic interest in private law, concerning itself primarily with a *just* ordering of private life. In this respect even its domestic private law is not ‘its own’ private law; it rather strives to seek the best and fairest solution for *all* men. Therefore, the application of foreign private law does not run counter to the nature and identity of the state. . . . [F]oreign private law represents only another answer to the question of *justice*.

Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91, 183 (1964). Compare the perception of shared policies to plaintiff-protecting or defendant-protecting policies. Conflicts cases arise precisely because plaintiff and defendant-protecting States disagree about which law is better. Lea Brilmayer, *The Other State’s Interests*, 24 CORNELL INT’L L.J. 233 (1991).

⁸¹ Kegel, *supra* note 80, at 184.

⁸² See *Strassberg v. New England Mut. Life Ins. Co.*, 575 F.2d 1262, 1263 (9th Cir. 1978) (affirming the district court’s conclusion that “by reason of the significant relationship between the beneficiary and the insured and California and the dominant interest of California in this matter, California law is applicable”); *Stickney v. Smith*, 693 F.2d 563 (5th Cir. 1982) (holding that Louisiana no longer automatically applies law of the place where contract is made to determine validity and interpretation of contract, but instead determines applicable law by a process known as “interest analysis”); *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069, 1073 (6th Cir. 1983) (holding that in Kentucky, the old *lex loci* approach to conflict analysis in contract cases has been replaced by an interest analysis, and confirming “that Kentucky has the greater interest in and the most significant relationship to this transaction and the parties”).

⁸³ AMOS SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW: WITH SPECIAL REFERENCE TO TORT PROBLEMS* 77 (1970).

⁸⁴ Friedrich K. Juenger, *Governmental Interests – Real and Spurious – in Multi-state Disputes*, 21 U.C. DAVIS L. REV. 515, 518–30 (1988); see also Glenway Indus.,

terest analysis may be sound and reasonable in the context of the demarcation of national jurisdiction in the field of economic regulations under public international law.⁸⁵ However, in the context of private international law,⁸⁶ we should seek "conflict justice"⁸⁷ and this requires due attention to be paid to the interests of individuals. Acknowledging a policy-oriented conflict resolution process, Shapira notes that Cavers "urges decision makers in the conflicts sphere to seek solutions which not only provide a reasonable accommodation for governmental policies, but also secure fair treatment to the private parties."⁸⁸

The response of the defenders of the governmental interest approach to the critics is that they ignore the state's responsibility to regulate the private affairs of those persons within its government-

Inc. v. Wheelabrator-Frye, Inc., 686 F.2d 415, 417 (6th Cir. 1982) (providing an example of a case involving fairness to individual litigants).

⁸⁵ Michael Sennett & Andrew I. Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing*, 19 INT'L LAW. 1185, 1185-89 (1989). The more recent cases have been decided in the context of balancing interests. See *Timberlane Lumber Co. v. Bank of America N.T. & S.A. (I)*, 549 F.2d 597 (9th Cir. 1976); *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 574 F. Supp. 1453 (N.D. Cal. 1983); *Laker Airways v. Sabena, Belg. World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (providing examples of cases decided in the context of balancing interests). But see P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,"* 41 INT'L & COMP. L.Q. 245, 246, 277 (1992) (claiming that the balancing of factors evident in recent American jurisprudence is not the best course of action in dealing with these situations, and can be a problematic strategy).

In determining whether state A should exercise jurisdiction over an activity significantly linked to state B, one important question is . . . whether B has a demonstrable system of values and priorities different from those of state A that would be impaired by the application of the law of A. . . . [Therefore,] conflict is not just about commands: it is also about interests, values and competing priorities. All of these need to be taken into account in arriving at a rational allocation of jurisdiction in a world of nation-states.

Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 51 (1995).

⁸⁶ See Vischer, *supra* note 2, at 30-31 (discussing the issue of conflict of law in private international law).

⁸⁷ Conflict justice is justice in private international law. In Kegel's view, "justice consists in balancing interests, and more particularly justice in private international law must balance the interests in the application of this or that system of private law." Kegel, *supra* note 55, at 15; see also Kegel, *supra* note 80, at 95 (proposing the idea of a "justice of conflict of laws").

⁸⁸ Shapira, *supra* note 83, at 76.

tal concern. The critics have failed, they say, "to realize that Currie's notion of law as having a regulatory function puts state purposes within private law."⁸⁹ Advocates of new versions of governmental interests, however, have noticed the fundamental dichotomy between governmental policies and fairness to the individual litigants.⁹⁰

Any choice of law system which is solely built on the concept of governmental interests, therefore, must be considered cautiously, as "[i]t is deplorable . . . to promote states' interests at the expense of private parties unfairly caught in surprise due to the invocation of an un contemplated law."⁹¹ It is true that the replacement of rigid conflict rules by a flexible methodology is preferable, but to limit this functional process only to governmental interests does not correspond to the needs of a comprehensive solution for all private and public interests at stake. The functional process, putting aside mechanical rules, would be an imperfect process if its only concern were the public interest.⁹²

Owing to this type of consideration, more comprehensive formulae have been suggested alongside the governmental interest theory. A whole series of other choice-influencing considerations have been proposed.⁹³ The number of factors suggested by these

⁸⁹ Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, in 215 (III) RECUEIL DES COURS 84 (1989).

⁹⁰ For example, Sedler says that, "[b]y functionally sound and fair results, I mean results that are acceptable in the sense that they do not produce unfairness to the litigants in the particular case . . . in which the application of such law would be considered objectively unreasonable." Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593, 639 (1983).

⁹¹ Shapira, *supra* note 83, at 77. See M. Rhienstein, Book Review 32 U. CHI. L. REV. 369, 375-76; (1965) (reviewing ALBERT A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS (1962), which addresses the dangers that can result from states disregarding private needs).

⁹² See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 306-07 (1990) (discussing an example where considering only the state's interests led to an unfavorable outcome).

⁹³ See Leflar, *supra* note 55, at 277-79 (listing Leflar's five proposed choice-influencing considerations); see also *id.* at 281 (discussing the increasing convergence of judicial decisions in choice of law cases). In *Bankers Trust Co. v. Bethlehem Steel Corp.*, 752 F.2d 874, 881-82 (3d Cir. 1984), the court followed the "flexible conflict methodology" which was used in *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1311-13 (3d Cir. 1978). A combination of interests analysis and Restatement (Second) of Conflict of Laws was employed by the Pennsylvania Supreme Court in the tort case of *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 801-03 (Pa. 1964). The Court extended this approach to contract actions. It also

theories varies. In these theories, however, the governmental interest is only one factor amongst others. Through these theories a more useful interest analysis, balancing interest or a policy of not only competing states but also individuals, should emerge.⁹⁴

4.3. *The Rome Convention Approach*

As a response to the need for a comprehensive solution to private disputes with a public interest dimension, the Rome Convention,⁹⁵ in spite of its methodological deficiencies, offers a unique and fairly balanced solution that takes into account both private and public interests. While one of the basic features of the Convention is its almost unconditional recognition of party autonomy, public interest has been given an equal priority when mandatory rules are at stake. Under the Convention the parties are free to

concluded that Pennsylvania's choice of law rules on the validity of a power of attorney refers to the law of India which had more compelling interest in that case. *See also* F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co. 882 F.2d 281, 286 (7th Cir. 1989) (noting that, under the Restatement, attempting to locate the site of a contract is "bound to fail"); *Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1176 n.5 (6th Cir. 1988) (noting that the Restatement supports a finding where both parties agree to choose the law of Vietnam, since defendant's branch in question and plaintiff's account was opened there in Vietnamese currency); *Johansen v. E.I. Du Pont De Nemours & Co.*, 810 F.2d 1377, 1381 n.5 (5th Cir. 1987) (holding that, in accordance with the Restatement, the law which has the most significant relationship to the facts at issue should be applied); *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 832 (5th Cir. 1986) (applying the Restatement to determine the applicable law); *Florida Risk Planning Consultants, Inc. v. Transport Life Ins. Co.*, 732 F.2d 593, 595 (7th Cir. 1984) (holding that, in a contract dispute where defendant sought illegality as a defense, the Restatement directed the court to look at the laws of other states where else plaintiff conducted business); *Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd.*, 847 F.Supp. 1244, 1248-51 (D.N.J. 1994) (holding that the court would not enforce a choice of law stipulation for Pennsylvania in a contract dispute because such a choice would violate New Jersey public policy, New Jersey had a greater interest in applying its law and that New Jersey had a more "significant relationship" to the transaction); *Dean Witter Reynolds, Inc. v. Shear*, 796 P.2d 296, 298-99 (Okla. 1990) (noting that a choice of law contractual clause could be avoided under the Restatement if the choice of one state over the other would be "contrary to a fundamental policy" and the laws of the other state would otherwise govern). Section 6 of the Restatement Second lists choice of law principles. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

⁹⁴ *See generally* William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?* 34 MERCER L. REV., 645 (1983) (providing an overview of problems that arise from the concept of eclecticism, which amalgamates a number of existing choice of law doctrines).

⁹⁵ Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 19 I.L.M. 1492 (1980).

choose the applicable law. The freedom to choose the applicable law is unlimited. It is possible to choose a law that is quite unconnected with the contract.⁹⁶ However, in the absence of choice by parties, the Convention points to the law of the country with which the contract is “most closely connected.” Yet, the notion of “close connection” is defined by more tangible factors such as the law of place of “characteristic performance” of the contract.⁹⁷ By use of “characteristic performance”, the Convention has followed an objective criterion for determining the corrective conflict justice.

On the other hand, another novelty of the Convention with respect to the regulatory disputes has to be seen in Article 3(3), which provides that a choice by parties shall not prejudice the application of mandatory rules of a country with which the contract is connected.⁹⁸ Article 7(1) has reiterated this provision with a broader scope but more discretionary character and recommends the application of mandatory rules of a country whose law is not the applicable law to the contract but is closely connected to the situation.⁹⁹ The application of mandatory rules could also be justified by reference to the concept of public policy.¹⁰⁰ Therefore, without going too far to impose unjustifiable restrictions on freedom of contract, the Convention recognizes that states have an interest in the application of their mandatory rules irrespective of the intention of the parties. These provisions of the Convention reflect a change of attitude towards foreign public law rules and involve an interest analysis and balancing of interest exercise.¹⁰¹

⁹⁶ *Id.* art. 3(1).

⁹⁷ The most important presumption is that of “characteristic performance”, which is to be found in Article 4(2). *Id.* art. 4(2). See RICHARD PLENDER, *THE EUROPEAN CONTRACTS CONVENTION 104-07* (2d ed. 2001) (explaining restrictions upon party autonomy).

⁹⁸ As the forum’s mandatory law may be applied by reason of Article 7(2).

⁹⁹ Convention on the Law Applicable to Contractual Obligations, art. 7(2), June 19, 1980, 1980 O.J. (L 266) 23.

¹⁰⁰ See *id.* art. 16 (allowing refusal of a country’s applicable law if it is manifestly incompatible with public policy of that forum).

¹⁰¹ See T. C. Hartley, *Beyond the Proper Law: Mandatory Rules Under Draft Convention on the Law Applicable to Contractual Obligations*, 4 EUR. L. REV. 236, 243 (1979) (concluding that the mandatory law of a given country must be weighed against other considerations in a foreign forum); DAVID F. CAVERS, *The Common Market’s Draft Convention on Obligations: Some Preventive Law Aspects*, in *THE CHOICE OF LAW: SELECTED ESSAYS, 1933-1983* 263 (1985) (discussing opposing preventative law aims of either choosing a forum state with favorable laws or choosing a state for the “prohibitions” it offers).

In spite of difficulties in defining mandatory rules, granting such rules a special treatment is a significant step towards separating two separate legal regimes. This position would clear up some ambiguities, which exist under the proper law approach to welfare and autonomy aspects of private disputes.¹⁰² Giving appropriate effect to the mandatory rules, together with the recognition of the autonomy of parties, would provide a sound solution for the conflicting public and private interests. It facilitates the practice of giving effect to regulatory rules even when they belong neither to the *lex fori* nor to the *lex contractus*.¹⁰³ This fundamental and unprecedented move, however, has provoked some protest on the basis that it would generate enormous uncertainty with considerable practical implications.¹⁰⁴ Although a very limited reference to the law of a third country, such as illegality under the law of place of performance as is allowed in the case of the United Kingdom, the anxiety was so grave that eventually it made a reservation with respect to the Article 7(1) when it ratified the Convention.¹⁰⁵

The very uncertainty generated by the Convention rules is the price for a more functional approach.¹⁰⁶ However, whilst the Con-

¹⁰² See David Jackson, *Mandatory Rules and Rules of "Ordre Public,"* in CONTRACT CONFLICTS, *supra* note 79, at 59, 71 (asserting that the Convention offers a clearer method of mandatory rule application than other alternatives).

¹⁰³ See T. C. Hartley, *Beyond the Proper Law: Mandatory Rules under Draft Convention on the Law Applicable to Contractual Obligations*, 4 EUR. L. REV. 236 (discussing how mandatory rules that favor forum versus mandatory rules that favor contract would be addressed by the Convention); IAN F. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW, 169 (1982) (discussing how the use of mandatory rules by the courts when neither *lex fori* nor *lex contractus* apply).

¹⁰⁴ See Lawrence Collins, *Practical Implications in England of The E.E.C. Convention on the Law Applicable to Contractual Obligations*, in CONTRACT CONFLICTS, *supra* note 79, at 205, 215-16 (asserting that mandatory rules are "of very vague and circular application" and will have to "balance[e] perhaps irreconcilable interests"); F.A. Mann, *Contracts: Effect of Mandatory Rules*, in HARMONISATION OF PRIVATE INTERNATIONAL LAW BY THE E.E.C. 31 (K. Lipstein ed. 1978) (discussing the several possible negative effects of mandatory rules); FLETCHER, *supra* note 103, at 171-72 (discussing problematic nature of mandatory rules).

¹⁰⁵ See PETER NORTH, PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS 133-34 (1993) (discussing how up to three forums' mandatory laws, as allowed in art. 7(1), could conflict, causing a power of reservation to be attached at the time of the Convention's creation for fear of diluting a home forum's influence); James Young, *The Contracts (Applicable Law) Act 1990*, LLOYD'S MAR. & COM. L.Q., 314, 324 (1991) (noting that the United Kingdom's reservation to not apply Article 7(1) of the Convention was because of its vagueness).

¹⁰⁶ See Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 283-84 (1984) (discussing the functionality of this choice of law scheme).

vention has proposed the closest model to the goal of establishing a functional methodology sought throughout this paper, it is not yet an ideal solution for recognizing and materializing the proper objective of party autonomy and welfare values and their interaction. The authors of the Giuliano-Lagarde Report have rightly noticed this point in the context of different aspects of the Convention. They thought that the judge of the forum has “the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular situation in question”.¹⁰⁷ However, mandatory rules have to be defined properly. It is not enough to underline the mandatory character of certain rules. In fact, in this context, the command character of rules is less important than their purpose and the interest which they serve.¹⁰⁸ An inquiry into the underlying objectives of each rule would unveil the corrective and distributive justice policy behind it.¹⁰⁹

5. FURTHER DEVELOPMENTS AND THE QUEST FOR A COMPREHENSIVE AND COHERENT SOLUTION

The latest developments in the theory and practice of private international law indicate a genuine attempt to reconcile form and structure with private planning on the one hand, and liberty and rights with welfare values on the other hand—issues which ultimately reflect the corrective and distributive justice dichotomy. Deduced from the above methodologies, a balanced and comprehensive solution that is faithful to the distinction between welfare and autonomy rules is an ideal methodology which can handle the complex interaction between these two paradigms. This should be a mechanism for discovering either “standard of justice” or “proper reach of public interest” by using “appropriate means.”¹¹⁰

¹⁰⁷ Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* (1980), available at http://www.rome-convention.org/instruments/i_rep_lagarde_en.htm; see also FLETCHER, *supra* note 103, at 161–63 (analyzing the range of choices available to a judge regarding choice of law as a result of the Convention’s construction).

¹⁰⁸ See Chamber of National and International Arbitration of Milan, *Final award of 23 September 1997*, 23 Y.B.COM. ARB. 93, 95 (1998) (showing examples of where the purpose of a law is more important than its command character).

¹⁰⁹ *Id.* at 96.

¹¹⁰ See A. Philip, *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the EEC Convention on the Law Applicable to Contractual Obligations*, in CONTRACT CONFLICTS, *supra* note 79, at 81–91 (discussing the concept of mandatory rules as it

Strict application of the above approaches can lead to unnecessary restrictions on party autonomy, defeating the intention of the parties or arbitrarily expanding of the freedom of the parties at the expense of public interests. In principle, under the proper law theory, party autonomy has an eminent place whereas public interest is not necessarily defeated. The confusion, nevertheless, stems from the way that subjective and objective criteria are applied to select the proper law as if they can equally and interchangeably effectuate party autonomy or welfare values.¹¹¹ As far as corrective justice and *ius dispositivum* rules are concerned, the objective connections per se are irrelevant. The question is what the parties, as just and reasonable persons, would have decided if they had thought about the matter—that is, what is convenient and just for them.¹¹² The proper law of the contract should be the law by which the parties intended, or might fairly be presumed to have intended, the contract to be governed.¹¹³

Similarly, the Rome Convention, while admitting such a dichotomy, does not offer a distinct practical means to discover the law applicable to either private or public spheres. The problem, indeed, is that under the Convention the criterion of “close connec-

applies to the EEC Convention, public v. private law, and its scope); Hartley, *supra* note 30, at 401 (suggesting that a first step would be to distinguish between rules based on general considerations of morality and those based on the public interest).

¹¹¹ See A.J.E. Jaffey, *The Foundations of Rules for the Choice of Law*, 2 OXFORD J. LEGAL STUD. 368, 382 (1982) (applying the principle of choice of law justice to situations in which the interests of the parties are in competition with the public interest of a country); A.J.E. Jaffey, *The English Proper Law Doctrine and the EEC Convention*, 33 INT'L & COMP. L.Q. 531 (1984) (arguing that the main provision of the EEC Convention dealing with the ascertainment of the proper law of a contract in the absence of a choice by the parties, if implemented, would be a considerable improvement on the existing English law); Blom, *supra* note 42, at 179 (“For any court committed to rule-selective methods, the question of the proper law *in vacuo* would be meaningless.”); Jaffey, *supra* note 74, at 40 (discussing consent of parties in English matrimonial law).

¹¹² See Ole Lando, *The Conflict of Laws of Contracts*, 189 RECUEIL DES COURS 225, 238, 318, 330 (1984) (claiming that by the middle of the last (20th) century and under influence of R. H. Graveson, the English courts and commentators abandoned the presumed intention criterion while in some other European countries it was retained); O. Lando, *Some Issues Relating to the Law Applicable to Contractual Obligations*, 7 KING'S C. L.J., 55, 58 (1996–97) (discussing Western European courts' shift away from reliance upon presumed intention when interpreting contracts).

¹¹³ See David G. Pierce, *Post-Formation Choice of Law in Contract*, 50 MOD. L. REV. 176, 201 (1987) (arguing that letting the parties choose the law to govern the validity of the contracts and the rights created thereby is the best way to attain the prime objectives of contract law).

tion" has a double function. Whereas in the context of Article 4 it is utilized to discover the implied or presumed intention of the parties and corrective conflict justice, in Article 3(3) and 7(1) it is used to ascertain the limits on freedom of contract in terms of identifying mandatory rules of the country with which the contract is closely connected.¹¹⁴ The presumptions in these articles are supposed to serve quite different objectives. The law which is "most closely connected" (Article 4(1)) to the dispute does not necessarily offer a just and fair solution. Moreover, the method of determining which law is closely connected to the dispute is also very problematic. To identify this law with the law of place of "characteristic performance" could be as unhelpful as the closely connected criterion itself.¹¹⁵ Even if it was easy to establish the closest law, it would still not mean that the relevant law is the just answer to the private dispute in question.

The American Restatement (Second) Section 188 calls also for the application of the law of the place of the "most significant relationship" and lists a number of contacts to be taken into account in making this determination.¹¹⁶ While the governmental interest theory categorically denies the dichotomy in favor of the public interest, the Restatement (Second) has inconsistently listed some factors as choice of law principles. In Section 6 a principle such as "governmental interest" is listed alongside the principles such as "the protection of justified expectation" or that of "certainty, predictability and uniformity."¹¹⁷ This formula seems to be incapable of distinguishing factors relevant for identifying governmental in-

¹¹⁴ The concept of mandatory rule is vague and does not speak of the underlying objective of a rule. A mandatory rule could be based on either corrective or distributive justice. The compulsory nature of rules does not necessarily reveal the interest which a rule serves. It seems that a focus on the mandatory character of rules is a legacy of formalism in private international law where the purpose behind the rules does not matter as much as the form matters.

¹¹⁵ See J.C. Schultsz, *The Concept of Characteristic Performance and the Effect of the EEC Convention on Carriage of Goods*, in *CONTRACT CONFLICTS*, *supra* note 79, at 198 (discussing the unhelpful nature of using the concept of "characteristic performance" in certain instances). For other views as to the methods of determining the applicable law in the absence of choice see FLETCHER, *supra* note 103, at 161-65.

¹¹⁶ For comments on the Restatement Second in this field, see Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 *CORNELL L. REV.* 927, 964 (1975).

¹¹⁷ There is considerable similarity between the Rome Convention's concept of "Characteristic Performance" and that which under section 188 of the American Restatement, the Second, is called the "most significant relationship." For more details, see REESE, ROSENBERG, & HAY, *supra* note 72, at 625.

terests from those which would refer us to a system of justice among the individuals.¹¹⁸

The "center of gravity," "grouping of contacts," and "choice-influencing considerations"¹¹⁹ theories under which the courts may end up considering all elements together¹²⁰ seem to be unable to satisfy the consistency criterion and the distinction made here.¹²¹ Balancing various factors and contacts, which could refer to one legal system covering all disputed issues, is not appropriate.¹²² Not all factors have the same value and objective, nor do they all necessarily refer to the same applicable law. The level of the operation of these factors, where they can compete, has to be determined *a priori*. In the process of selection of a law, the justice in maintaining private planning and risk allocation cannot be balanced against governmental interest, as each belongs to a different paradigm.¹²³

¹¹⁸ See Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 563, 585 (1983) ("The 'center of gravity' approach soon proved itself incapable of consistently distinguishing between factors relevant and irrelevant to the choice of law decision.").

¹¹⁹ Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585-88 (1966).

¹²⁰ ROGER C. CRAMTON ET AL., CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS 197, 309 (3d ed. 1981). Under New York's choice of law analysis, followed in *Dornberger v. Metropolitan Life Ins.*, 961 F. Supp. 506, 530-31 (S.D.N.Y. 1997), the jurisdiction with the most significant interest in or contact with the particular dispute is the jurisdiction whose law is applied. For claims in contract, New York uses a "grouping of contacts" or "centre of gravity" approach. In *Rutherford v. Goodyear Tire and Rubber Co.*, 943 F. Supp. 789, 790-91 (W.D. Ky. 1996), the district court observed the forum choice of law principles including an interest analysis approach.

¹²¹ William L. Reynolds and William M. Richman, in their article on Leflar, have expressed their surprise that he includes governmental interest of the forum as one of his choice influencing considerations. See William L. Reynolds & William M. Richman, *Robert Leflar, Judicial Process, and Choice of Law* 52 ARK. L. REV. 123, 138 (1999); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that in this case no true conflict exists between domestic and foreign law because defendants did not show their compliance with the laws of both countries was impossible); CRAMTON ET AL., *supra* note 120, at 327 (discussing alternative modern approaches to choice of law).

¹²² The Principles of Preference suggested by David F. Cavers is, in fact, a sophisticated combination of policy, party expectations, and territorialism. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 139-45 (1965).

¹²³ The correlativity of these considerations and factors is a complex issue which highlights their incompatibility in some cases; see Luther L. McDougal III, *Leflar's Choice-Influencing Considerations: Revisited, Refined and Reaffirmed*, 52 ARK. L. REV. 105, 116 (1999) (cautioning that the five types of considerations may not be prioritized, as different considerations will be important in each case). This problem, however, is not identical to "depcage" and the need for splitting up the ap-

The scope of international application of a rule and its interaction with other relevant rules depends very much on what is the nature of the rule upon which a private matter is disputed. This means that the demarcation of the boundaries of public and private law is an essential step in the process of conflict resolution.¹²⁴ In this respect von Mehren, who supports a more general interest analysis, has made a very useful distinction between two basic principles of justice: the principle of “equal treatment” (autonomy) and that of “advancement of values” (welfare values).¹²⁵

Certainly the classification of rules into private or public and autonomy or welfare must take place prior to any other analysis in the conflict resolution process.¹²⁶ The need for classification also shows that the utility of conflict rules is often overestimated.¹²⁷ In light of the changes and complexities that legal institutions are undergoing, characterization is no longer a simple process. Rather, it involves detailed and substantive analysis.¹²⁸ The idea of a public and private law distinction should be channeled to a slightly more accurate distinction between corrective and distributive justice or between autonomy and welfare values.¹²⁹ We have to make a

plicable law; see McLachlan, *supra* note 38, at 311 (discussing the necessity for splitting up the applicable law).

¹²⁴ See Kurt Lipstein, *Conflict of Public Laws – Visions and Realities*, in FEST-SCHRIFT FÜR IMRE ZAJTAY 357, 367 (Ronald H. Graveson et al. eds., 1982) (discussing situations when foreign laws are absolutely binding).

¹²⁵ See Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 33 (1977) (“[T]he alternative to the advancement of values is in many cases not equality of treatment but unequal treatment combined, on occasion, with non-advancement of values.”); William S. Dodge, *Extra-territoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 103–05 (1998) (advancing two process-based arguments that the international system would work best if every nation’s courts were to adopt a unilateral approach to extraterritoriality).

¹²⁶ See Jackson in CONTRACT CONFLICTS, *supra* note 79, at 60 (discussing the difference between private and public law); Lipstein, *supra* note 124, at 360–61 (analyzing different methods of characterizing laws).

¹²⁷ See Mann, *supra* note 47, at 123 (providing examples of the overestimation).

¹²⁸ See Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, 252 RECUEIL DE COURS 9 (1995) (discussing the “distinctive nature of rules . . . the different functions of substantive and choice of law policies . . . and . . . the difference between formation of rules and their application”); Christopher Forsyth, *Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws*, 114 L.Q. REV. 141, 160 (1998) (the theoretical discussions on conflict of laws have not been applied in practice, creating an inherent flaw).

¹²⁹ Compare this distinction to the distinction between “validity” and “con-

sharp distinction between balancing private and public interests. This distinction is based on the strict application of corrective and distributive justice dichotomy at the domestic level. If corrective and distributive justice underpins distinct paradigms, then balancing public and private interests against each other in an international setting would not make much sense. As much as distributive justice considerations should not interfere with the internal structure of contract and tort law, the process of choice of law for resolutions of private disputes should not be affected by welfare objectives.¹³⁰

The logical coexistence of liberalism (autonomy) and communitarian (welfare) should be possible. In the context of private disputes, the main objective should focus on establishing a lexical relationship between rules triggered by distributional values and those based on corrective justice; a relationship that would allow accommodation and just redistribution of the impact of application of the former category into the latter.¹³¹ However, in spite of the accommodation of the regulatory impact, the core of private relations would remain valid and independent of any welfare consideration.¹³² Certainly, conflict theories cannot remain indifferent to this rationalization.¹³³ The use of the same arguments in the conflict of laws, where the principle of party autonomy is paramount¹³⁴ and the distributional objectives are more flexible and

struction." See Weintraub, *supra* note 106, at 252-54 ("[T]he distinction between conflict of laws concerning the validity of a contract and concerning its construction is central to any sensible application of functional analysis.").

¹³⁰ It would be an illusion to think of global welfare in a world in which we have no global distributive justice.

¹³¹ See von Mehren, *supra* note 125, at 30-32 (explaining that theoretically, there need not be a choice between values and equal treatment, but practically this is not always the case).

¹³² See Jaffey, *supra* note 111, at 538 (1984) (describing the distinction between *Jus Dispositivum* and *Jus Cogens*); *id.* at 368, 374, 378, 379 (1982) (applying the principle of choice of law justice to situations in which the interests of the parties are in competition with the public interest of a country); see also *supra* Section 2 (discussing the emergence of economic regulations and welfare values in private law).

¹³³ See Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 884 (1990) (speaking about conduct regulating and loss-allocation rules); see also Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L. J. 197, 207-08 (1991) (discussing the incorrect oversimplification that often occurs in substantive or multi-state policies).

¹³⁴ GEORGES R. DELAUME, *TRANSNATIONAL CONTRACTS APPLICABLE LAW AND SETTLEMENT OF DISPUTES* (1997).

adaptable to international disputes, would be even more appropriate.¹³⁵ The dichotomy becomes more crucial, conspicuous, and fundamental as corrective or distributional justice involving an international private litigation often does not belong to one politically organized society.¹³⁶

A viable solution, therefore, seems to be a system which seeks 'predictability of private planning' and 'reasonable expectation of the parties' as much as possible for corrective justice or autonomy values.¹³⁷ The use of such an objective methodology of balancing public interests facilitates the identification of its legitimate international reach.¹³⁸ Therefore, what matters in the context of corrective justice is the extent to which it reflects "submission and consent," "private planning," "justified expectation," and "reasonable reliance."¹³⁹ This view, of course, considers private law simply as a reflection of corrective justice.

There are, however, two problems with this framework. First, it lacks any rule and standard according to which judges or arbitrators can identify the applicable corrective justice.¹⁴⁰ Second, it could be criticized for its failure to offer workable techniques in the

¹³⁵ The idea that there could be international distributive justice to which outsiders and insiders would be equally subject is not yet established. In light of current international relations, it does not seem to be a persuasive idea. For a different view, see CHARLES JONES, *GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM* 2-14 (1999) (discussing distributive justice in the international context).

¹³⁶ See Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 18-19 (1991) (challenging liberals to explain how party membership can be an adequate means of authority in the international setting); Kay, *supra* note 118, at 563, 585 (suggesting five criteria for making conflict of law decisions).

¹³⁷ See Peter E. Nygh, *The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort*, 251 RECUEIL DE COURS 269, 295-96 (1995) (noting that the reasonable expectations of parties includes the expectation that their autonomy and reasonable interests will be respected and the expectation that they will be treated fairly). It is important to note that predictability here means a value for private choice and planning, which is different from formalism as an imposed external order.

¹³⁸ Jaffey, *The English Proper Law Doctrine*, *supra* note 111, at 533-35. For a similar distinction between subjective and objective methods, see Lando, *supra* note 35, at 53-54.

¹³⁹ SHAPIRA, *supra* note 83, at 85-92 (analyzing these notions and finding that they offer "but a partial rationalization for the principle of rational connection").

¹⁴⁰ *Id.* at 62. See William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1390 (1997) (stipulating that the major issue in choice of law is whether decisions should be made by rules or approaches); see also Juenger, *supra* note 75, at 33 (explaining that it is not possible to ascertain the scope of rules from their underlying policies).

difficult task of determining the policies underlying each particular domestic rule. It has also been argued that requiring courts or arbitrators to investigate underlying policies of rules is unreasonable.¹⁴¹ Moreover:

"Interests," as Currie used the term, were not subject to being weighed or quantified. A state was either interested or it was not. No court in a democracy, he argued, had the right to sit in judgment on the legislative policies of two sovereign states and declare one inferior to the other.¹⁴²

We seem to face a dilemma: should we reintroduce hard and fast rules that produce unjust results, encourage evasion of law, and ignore public interest, or should we retain the less straightforward approach?

6. CONCLUSION

Old systems of conflict of laws belong to an era when nation-states emerged and legal rules were seen as signs of sovereignty. In such a world, the regulation of cross-border activities and, therefore, peace, stability, and justice, could not have been achieved without certain self-imposed mega-rules, namely conflict rules, coordinating and accommodating national private laws. However, many changes, both in international relations and in the form, content, and scope of substantive laws, have made a revision of conflict of laws systems imperative. The conflict of laws has been encumbered with formalism and rigid structure, which explains both its resistance to common sense and substantive values and its failure to catch up with the pace of the above detailed developments. In particular, the process of legal particularization and the pursuit

¹⁴¹ But see Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 779 (1983) (stating that there is now, however, a shift back to considering the policies behind rules).

¹⁴² Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Laws*, 27 VT. L. REV. 1, 6 (2002) (citations omitted). See Friderich Juenger, *What Now?* 46 OHIO ST. L.J. 509, 516 (1985) (stating that the theories in conflict of laws "blind us to realities"); Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics,"* 36 AM. J. COMP. L. 681, 687 (1988) (critiquing criticism of interest analysis); Symeon Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?* 46 OHIO ST. L.J. 549, 567 (1985) (stating that Currie would apply forum law in all cases, except when there is a false conflict and the forum is not interested); Juenger, *supra* note 15, at 82-83 (stating that conflict of laws is a "pluralism of methods" and assumes, incorrectly, that judges are to apply foreign and domestic law equally).

of welfare objectives through either regulatory mechanisms or private law has cast doubts on the wisdom of the conflict of laws and heralded in a new world order. The ever-increasing role of regulatory laws in private adjudication and welfare objectives in private law have specially highlighted the challenges facing formal systems; the project of conflict of laws operates on the assumption that substantive national laws have abstract, private, apolitical, and corrective justice characters.

These realities have, accordingly, prompted a revision and restructuring of the discipline to a varying degree around the world. In some instances, it has led to the total rejection of the conflict rules. Nowadays, there are many theories in favor of more realistic approaches to cross-border conflict. In particular, an analysis that pays attention to the underlying objective of rules is a common approach. A trend toward a less formal approach and substantive justice is almost universally accepted, though the degree of its implementation varies from country to country. Nonetheless, and despite much progress, the field of conflict of laws still contains many fundamental theoretical paradoxes.

A lack of serious theoretical analysis is the most common problem in the discipline. It precludes the emergence of a consistent, all-encompassing, and appropriate conflict system sensitive to the underlying objectives of substantive laws, in terms of corrective and distributive justice goals, and adaptable to the changing nature of the legal problems in private international transactions. There is an urgent need for a more balanced and comprehensive theory. This theory must encompass the issues of rights, liberty, and their interaction with welfare objectives in an integrated world. This theory must also provide a means to analyze how each state sets its own welfare objectives and defines its own standard of justice. A major flaw in most of the current conflict theories is the under-inclusion of human rights concerns and the domination of formalism or welfarism at the expense of the liberty and rights of individuals. A rights-based theory in conflict of laws, therefore, supports anti-formalism campaigns of interest analysis, but at the same time resists it at the substantive level on a corrective justice basis.